it should be derived from the ancient Egyptians, whose idolatry was so gross, sottish, and bestial, and its outward expression so grotesque, mean, and contemptible, as to render them the laughing-stock of even the idolatrous Greeks and Romans. Thus Juvenal, in one of his most severe and dignified satires, exclaims ;

> "O holy nations! Sacro-sanct abodes!
> Where every garden propagates its gods!"

But we do not intend to protract these remarks, and would not willingly incur the charge of hypercriticism, and especially on a subject of such seemingly small importance. We think, however, that all must agree with us, that if these symbols or emblems are used at all, they should be appropriately used ; and that all incongruity, and still more any approach to absurdity, sadly jar with the fitting associations of the place.

ART. V. — 1. *Speech of* MR. CHOATE, *of Massachusetts, on the Case of Alexander McLeod, delivered in the Senate of the United States, June 11th*, 1841. Washington : "National Intelligencer" Office. 8vo. pp. 16.

2. *Speech of* MR. BENTON, *of Missouri, on the Case of McLeod. In Senate, Monday, June 14th*, 1841. Washington : "Globe" Office. 8vo. pp. 8.

3. *Opinion delivered by* Mr. Justice COWEN, *in the Matter of Alexander McLeod, in the Supreme Court, on Habeas Corpus*, July Term, 1841. (Published in the "New York Spectator" of July 14th.)

4. *Message* from the PRESIDENT OF THE UNITED STATES, (July 14th, 1841,) *transmitting a Communication from the Secretary of State, in Relation to the Seizure of American Vessels by British armed Cruisers, under the Pretence that they were engaged in the Slave Trade ; and also, Correspondence with Consul Trist, upon the Subject of the Slave Trade, in Compliance with a Resolution of the House of Representatives, of the 21st ultimo.* Twenty-seventh Congress. First Session. Document No. 34.

THERE is no question that we stand just now on rather a slippery footing with our stern mother England. The affair

of Schlosser, though by no means the only disturbing cause, is enough alone to threaten plenty of trouble. On the 29th day of December, 1837, Navy Island, on the river Niagara and within the British border, being occupied by a party of Canadian rebels and a rout of American "rascaldom," their allies, an American steam-boat passed over to it with a reinforcement of men, provisions, and munitions of war. That night, as she lay made fast to a wharf in the village of Schlosser, full of people asleep, perhaps prepared for a similar expedition the next day, she was attacked by an armed party in boats from the Canada side. They boarded her, drove out her passengers and crew, threw off her fasts, towed her into the stream, and sent her blazing down Niagara Falls. One man, Amos Durfee, was killed on the shore. Whether others came to their death in the boat, by sword, fire, or drowning, has not been ascertained, the adventurers being little known to each other, and being generally of a class of people whose whereabout is not easily traced.

The "transaction," as Mr. Fox daintily calls it, occasioned, not unnaturally, a strong feeling of resentment in this country. Armed irruptions into a neutral territory are never kindly taken by the invaded party. When attended with the destruction of property, and the death of men, they do not fail to create extreme dissatisfaction. A nation is tenderly jealous of the sanctity of its soil. The peaceable citizen is thoughtful for the security of his fireside. Mr. Van Buren, then President, applied to the British Government through the Minister at London for explanation and redress. The British government said nothing to the purpose, waiting to be further pressed. By and by, one Alexander McLeod came over to the American side, and boasted, truly or falsely, that he belonged to the boarding party, and with his own hand had put one of the Caroline's people to death. He was apprehended and examined ; the Grand Jury of the County of Niagara found a true bill against him for the murder of Durfee, and he was put in prison to await his trial.

As things grew serious for McLeod, they melted the diplomatic reserve of England. A British subject was in peril of his life under a foreign jurisdiction, for doing (so it was said) a subject's duty ; and the practised mane of the British lion could not choose but bristle. The minister of that power

at Washington, Mr. Fox, demanded McLeod's release. The American Secretary of State, Mr. Forsyth, replied, that he was in the hands of justice in New York, and must await his deliverance in the regular course. Mr. Fox reported this answer to his government, and in reply was directed by Lord Palmerston to assume the attack upon the Caroline as an act done by the authority of the British government; — an act, therefore, for which that government was responsible, — responsible to any foreign power, which might consider itself aggrieved, and bound to its own subjects to secure to them impunity for whatever agency they had had in it. And on this ground, he, in the name of his government, repeated the demand for McLeod's immediate discharge.

Thus the business assumed a new phase. Mr. Webster, who had become Secretary of State, replied; Now you let us understand you. You tell us, what you have not told before, that you hold yourselves answerable as a nation for this intolerable wrong, and that, this being so, we ought to put out of the question McLeod and his associates, who were bound on their allegiance to be your instruments, at your discretion, in any act of war. We assent to the principle, and will act in good faith upon it. But as yours and ours are governments of law, we do not understand you to demand of us to compass what we both desire, by any illegal step. In Great Britain and the United States of America, whoever is in the custody of law, must by process of law be delivered. If the matter of McLeod were in a Federal court, the President would release him by directing the prosecuting officer to enter a *nolle prosequi*. As it is, we must proceed differently; and should he not be discharged by the inferior tribunals, we will take care to have his case carried up to the Supreme Court of the United States, to whose especial prerogative it belongs to take cognizance of legal questions involved in the foreign relations of the country.

This correspondence, communicated to Congress early in the extra session, in June last, led to a vehement debate in both Houses. When is an individual, engaged in hostile acts against one country or its citizens under the authority of another, clothed with the immunities which attach to a prisoner of war? If he enters foreign lines as a spy, or robs a mail to get at a government despatch, he cannot throw the responsibility on his superiors, and plead their commands in

his defence ; what acts can he do, and have that defence avail him ? What *war* is that which will be a legal justification of acts done in its prosecution ; and was the affair of the Caroline, with its concomitants, actually a war in the contemplation of this principle ? If a nation avows an injurious act of its citizen, and we determine to hold it accountable in the way of national redress, are we thereby precluded from visiting the individual also with the penalties of municipal administration ? These are some of the questions which were argued. Some exciting topics naturally came in to extend the range of debate. A piquancy was given to it by an expression in the British minister's letter, construed into a threat of consequences to follow a neglect of his demand ; and one Senator, from a rather turbulent region, professed himself disposed to hang McLeod, if it were for no other reason than that the British had threatened us with what they would do in that event.

In the July term, McLeod was brought up before the Supreme Court of the State of New York, under a writ of *habeas corpus*. Availing themselves of a provision of the recent *Revised Statutes* of that State, his counsel put in his affidavit to the effect, 1. " That he was absent, and did not at all participate in the alleged offence ;" 2. " That, if present and acting, it was in the necessary defence or protection of his country against a treasonable insurrection, of which Durfee was acting in aid at the time."

After a full hearing, the writ was dismissed. The opinion of the court was delivered by Mr. Justice Cowen. The Judge, in the first place, produces the authorities to show, that by the Common Law, McLeod, being under indictment for a felony, could not claim even to be admitted to bail on such grounds as those on which he had claimed a final discharge. Then he considers whether the statutes of New York have, in this respect, enlarged the powers of the court, and concludes, that when, on a writ of *habeas corpus*, they allow the allegation of any fact " to show that imprisonment or detention is unlawful," they refer to facts touching the lawfulness of the *authority* for imprisonment or detention, and not to facts touching the guilt or innocence of the prisoner, these being only cognizable by a jury. Next, he inquires whether it is the duty of the court to direct the entry of a *nolle prosequi*, the concurrence of the court with the

prosecuting officer being required for this by the laws of New York; and he answers the question in the negative, for the reason that the statute gives the court no power of directing this entry, but only of consenting to it when proposed by the public prosecutor.

The shell broken, the Judge addresses himself to the kernel, in a consideration of the argument of counsel, denying jurisdiction on the ground that the case "belongs exclusively to the *forum of nations*, by which counsel mean the diplomatic power of the United States and England, or, in the event of their disagreement, the battle field." We need not follow him in the distinctions, which he here labors at length, between *solemn* and *unsolemn* war, since, as he rightly concludes, by the modern law of nations, "both sorts of war are lawful, being carried on under the authority of a power, having, by the law of nations, a right to institute them." But, he says, "to warrant the destruction of property, or the taking of life, on the ground of public war, it must be what is called *lawful war*, by the Law of Nations, a thing which can never exist without the actual concurrence of the war-making power. This, on the part of the United States, is Congress; on the part of England, the Queen."

Without the *actual concurrence* of the *Congress of the United States*, or the *Queen of England*, no hostile act can be lawfully done by a portion of the American or the British people;—if by the phrase *actual concurrence*, in this proposition, is not meant that which it seems to mean, the proposition is a very sound and unassailable truism; if otherwise, it is a very bold absurdity. It would be worth while to *assist* at General Gaines's reception at his first visit to the Presidential mansion, if a party of Indians should come to beat up his head-quarters at Memphis, and he should stack his arms, and take steam-boat to report at Washington that he had no intimation of the *actual concurrence* of Congress in his adopting measures of defence. The concurrence of the sovereign is necessary, without doubt, to constitute a lawful war, but it is a concurrence, which, in a variety of circumstances, must be presumed. It is to be presumed that the Queen of England, and the Congress of the United States, mean that their frontier shall be defended whenever it is threatened, and the officers and soldiers who defend it may very safely rely on their *actual concurrence* in

the defence, and would be very imprudent to entertain any doubt about the matter. According as Judge Cowen's words here are construed, his doctrine is altogether immaterial to the purpose in hand, or else it is not only not true, but admits of, or rather is, a *reductio ad absurdum*. If the *actual concurrence* of the sovereign in necessary hostilities for the defence of his territory, (this doctrine, of course, is independent of the question *what* hostile measures of defence may in any case be necessary,) if this is not to be understood as expressed in a general commission, or presumable from the object of self-protection, incident to the organization of civil communities, there is small safety for the subject except as he seeks it close by the capital; — there is nothing to prevent our company on the Aroostook from installing itself next week in Quebec; the garrison at Quebec will point a cannon against them at its peril. And as this is common sense, so it is good, old-fashioned law. Says Vattel;

"Every military officer, from the ensign to the general, enjoys the rights and authority assigned him by the sovereign; and the will of the sovereign in this respect is known either by his express declarations, contained either in the commissions he confers, or in the military code, or is, by fair deduction, inferred from the nature of the functions assigned to each officer; for every man who is intrusted with an employment is presumed to be invested with all the powers necessary to enable him to fill his station with propriety, and successfully discharge the several functions of his office. . . . . These particulars merit the utmost attention, as they furnish a principle for determining what the several commanders, who are the subordinate or inferior powers in war, may execute with sufficient authority. Exclusive of the consequences which may be deduced from the very nature of their employments, we are likewise to consider the general practice and established usage in this respect. If it be a known fact, that, in the service of a particular nation, officers of a certain rank have been uniformly invested with such or such powers, it may reasonably be presumed that the person we are engaged with, is furnished with the same powers."— Book III. Chap. ii. § 19.

"It was conceded in argument," however, says Judge Cowen, "that the Canadian provincial authorities had no inherent power to institute a public war." Then something utterly absurd was conceded, if by *public war* and *inherent*

power in this proposition is meant any thing which shall cause the proposition to be at all a pertinent one. Nothing can be more preposterous than to deny that colonial authorities may take hostile measures for the defence of their soil, and of their sovereign's right in it, and that this action of theirs will clothe the armed men whom they employ, with the immunities, whatever these may be, of soldiers in public war. No publicist, of credit, has ever ventured any thing like such a denial. Judge Cowen refers, for his doctrine, to Rutherforth (Vol. II. pp. 496–8). But Rutherforth, though perhaps he does not express himself with entire clearness or consistency, is evidently treating no such case as that of the powers of the military authority of a colony threatened with invasion; and when, in this passage, he says, "A war, though it begins from a person who is a magistrate, will not be a public war, unless it begins from him *as a magistrate*, that is, unless he is authorized by the society to make war," he leaves all to depend on the very question of fact which is the only one that can be at issue in this part of the case; viz. Are the colonial authorities to be considered as so charged with the safety of the colony, as to be competent to take hostile measures in their sovereign's behalf, for its defence? And Rutherforth immediately adds (p. 502), in a passage which Judge Cowen appears to have overlooked; "An inferior magistrate may use what force he has at hand to repel such an immediate danger, as will not allow him time to have recourse to the supreme executive body."

Again, Judge Cowen quotes Ward ("Foundation and History of the Law of Nations," Vol. I. p. 294), as saying, that "no *private* hostilities, however general, or however just, will constitute what is called a legitimate and public state of war." But Ward here means by *private hostilities*, as any one may see who will turn to the passage, hostilities carried on by "individuals possessing no public character, and authorized by no public commission;" and the same is the intention of Blackstone in the passage ("Commentaries," Book I. chap. vii. § 3) to which Judge Cowen merely refers; he is treating the case of "unauthorized volunteers in violence," by whose hostilities, he says, "the state ought not to be affected, unless that should justify their proceedings." Once more; Judge Cowen cites a *dictum* of Lord Ellenborough; (Blackburne *vs.* Thompson, East's "Reports," XV.

90.) " I agree, that it belongs to the government of the country to determine in what relation of peace or war any other country stands towards it, and that it would be unsafe for courts of justice to take upon them without that authority to decide upon those relations. But, when the Crown has decided upon the relation of peace or war, in which another country stands to this, *there is an end of the question.*" Judge Cowen italicizes the last words, denoting their meaning to be, that there can be no other end to the question. He perhaps did not observe that Lord Ellenborough goes on ; " *And, in the absence of any express promulgation* of the will of the sovereign in that respect, it may be collected from *other acts of the state.*" Indeed, in the report of the same case in Campbell, (Vol. III. p. 66,) his Lordship is represented to have said, " the *most potent* evidence upon such a subject is the declaration of the state," establishing the inference that there may be other evidence.

Proceeding from the concession of counsel " that the Canadian provincial authorities had no inherent power to institute a public war," Judge Cowen says ;

" We were, however, referred to Burlamaqui, Part 4, ch. 3, §§ 18, 19, to show that those authorities might do so on the presumption that their sovereign would approve the step, and that such approbation would reflect back and render the war lawful from the beginning."

The language of Burlamaqui is as follows ;

" A mere presumption of the will of the sovereign would not even be sufficient to excuse a governor, or any other officer, who should undertake a war, *except in a case of necessity,* without either a general or particular order. . . . . Certainly sovereigns will never consent that their ministers should, whenever they think proper, undertake without their orders, a thing of such importance as *an offensive war,* which is, the proper subject of the present inquiry. In these circumstances, whatever part the sovereign would have thought proper to act, if he had been consulted, and whatever success the war undertaken without his orders may have had, it is left to the sovereign to determine whether he will ratify, or condemn, the action of his minister. If he ratifies it, *this approbation renders the war solemn,* by reflecting back, as it were, an authority upon it, so that it obliges the whole Commonwealth."

Nothing, it would seem, could be more unquestionable than this doctrine, or more directly applicable to the present

case. Judge Cowen, however, proposes to regard it as inapplicable, simply because England, in the guarded civility of diplomatic correspondence, has refrained from giving to the assault upon the Caroline the very plain-spoken title of an act of public war. "Neither the provincial authorities nor the sovereign power of either country," he says, "have, to this day, characterized the transaction as a public war, actual or constructive." Perhaps they have not, and perhaps they will not, at least till they have gone further in losing their temper and their manners. But, diplomacy apart, Mr. Fox's periphrastic expression, "a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authority to take any steps and do any acts which might be necessary for the defence of her Majesty's territories and for the protection of her Majesty's subjects," is one, we take it, not so very far from being synonymous with "public war," or any other equivalent shorter phrase which Judge Cowen might prefer. "Again," says the Judge, "if this view of the transaction [that is, as a 'lawful act of magistracy'] can be sustained, it was lawful *ab initio*. It required no royal recognition to render it national." Of course not. It is not the nature of *recognition* to *render* a thing one thing or another, but simply to explain and determine what it was and is. Avowal, in a case like the present, does not invest the subordinate with any new power, but it ascertains the point, that with such and such a power he had already been invested. As to the assailants of the Caroline, we of this country could not tell at first whether they acted on their own behalf, or on that of England. Had it turned out that they acted on their own, we should have been entitled to punish them ourselves, if in our hands, or to demand their punishment at the hands of England. England, who certainly has a right to know, says that they did it in her behalf and by her authority. All that remains then is, that she will justify it to our satisfaction, or expose herself to our displeasure and its consequences.

But we must do Judge Cowen the justice to say, that though his so explicitly asserted doctrine forbids colonial authorities, without express antecedent warrant from their sovereign, to protect their soil by warlike operations, he forthwith virtually rejects that doctrine. He speaks of a "power which the Canadian authorities held from England

to act in her place and stead," and says, " *So long as they confined themselves* within the territorial line of Canada, they were doing no more than the nature of their connexion with England required, sustaining that absolute and exclusive jurisdiction to which she is entitled with every other nation." So then, the rule is not precisely what it was just now. Just now, to justify any hostilities whatever on the part of colonial authorities, the " actual concurrence " of the sovereign at home was necessary. Now it is not necessary to justify hostilities within the colonial border, but only those exterior to it. The Judge is arguing here the question, what colonial authorities may do without the express direction of the government, and he now says, that they may not cross their border in any operations pretended to be for its defence. If they do, they divest themselves of the immunities of public war. This doctrine is a wide enough departure, to be sure, from what had before been so elaborately maintained ; still it makes an intelligible distinction, as it appears designed to make a grave one, between the lawfulness of foreign hostilities waged by the sovereign, or by colonial, authority. But the confusion of ideas is rendered complete, when, in the very next sentence it is said ; " Whether they had power, without pretence of being engaged in a war with the United States, *or could derive power from England*, to fit out an expedition, cross the line, and seize or destroy the property and persons of our citizens in this country, and whether *any one* acting such an assumption of power can be protected, is quite a different question." And so, after all, the question is not about the power of colonial authorities to conduct, 1. hostilities of any kind, or, 2. hostilities beyond their own border ; but, about the power of England to command any of her subjects to enter in arms a neutral country.

This is nothing more nor less than the old question, unembarrassed with any foreign incidents whatever, What circumstances those are which will justify a breach of the well-established rule that a nation's soil, like a man's house, is its castle. Neutral territory is in theory inviolable ; no doubt of it ; and so are many other things which, notwithstanding, are in fact violated, and for the violation of which the violator is held justified by the emergency of the case. I have no right to roil my neighbour's fish-pond ; but if my child has fallen into it, I shall take the risk of the trespass,

and expect to be excused. I have no right to tread down his standing corn; but this consideration will hardly keep me quiet, if I see some one, whom he cannot control, pointing a blunderbuss at me from his side of the fence. The inviolability of territory is a law; but self-defence, — and this extending to aggressive operations, if the necessity of the case requires them, — is the supreme law, to which every other does and must yield. It is a law, no doubt, subject to be referred to in erroneous applications, to justify what cannot be justified by it; but its reasonableness as a law, and its cogency when fitly applied, no sane man will call in question. All that, in such an event, the government of the invaded country can say to the invader is, You have not made out that case of extreme danger to yourselves, which alone can justify a step so extraordinary. The mischief apprehended by you was not intolerable; or it was not imminent; or you might have been protected against it by our own action; or your action transcended the limits which the existing emergency covered. If none of these pleas can be maintained, all that it can do is to sit down content, and guard itself for the future by such precautions as it may, against the recurrence of occasion for a step so justifiable in the other party, but still to itself so unpleasant. Our own government stood on the correctness of this statement, in its justification of itself to the Spanish government for the invasion of Florida by General Jackson, in 1817. In the following paragraph, Judge Cowen remembers only the rule, and forgets the exception. What is more to the purpose, he waves all distinction between colonial and national hostilities.

"All rightful power to harm the person or property of any one, dropped from the hands of McLeod and his associates the moment they entered a country with which their sovereign was at peace. *No exception* can be made consistently with national safety. Make it in favor of subordinate civil authorities of a neighbouring state, and your territory is open to its constables; in favor of their military, you let in its soldiery; *in favor of its sovereign, and you are a slave.* Allow him to talk of the acts and machinations of our citizens, and send over his soldiers on the principle of protection, to burn the property or take the lives of the supposed offenders, and you give up to the midnight assault of exasperated strangers, the dwelling and life of every inhabitant on the frontier, whom they may suspect of a disposition to aid their enemies. Never, since the treaty of 1783, had

England, in time of peace with us, any more right to attack an enemy at Schlosser, than would the French have at London in time of peace with England."

This last statement is precisely correct. If an attack of the French upon London would not, under similar circumstances, be justifiable, then cannot the Canadian attack upon Schlosser be justified. The question simply is as to the exigency of the dispensing circumstances. Judge Cowen, though he had just now ruled that the law knows no exception, proceeds presently to allow that some exception must be made, and accordingly goes on to inquire whether the attack upon the Caroline was made under such circumstances as entitled it to the plea, — in itself relevant and sufficient, — of necessary self-defence. If what he had before said was well-founded, it was needless to ask this question as to the lawfulness of that movement; *de re actum esset;* but he does ask it, and concludes that the circumstances were not such as to afford that justification. The Secretary of State had so concluded before him, and in our judgment both concluded rightly. But in their ulterior conclusions they differ. England, says the Secretary, has by her colonial authorities done us a wrong, and must answer for it. England, says the Judge, has does us a wrong and must answer to our sovereignty in negotiation or war; McLeod also has done us a wrong, and must answer to our courts in the issue of an indictment and trial. And as to the practical application of the doctrine of individual irresponsibility under the given circumstances, Mr. Webster further says, The doctrine being sound, McLeod ought to have the benefit of it before trial, and be forthwith discharged. Judge Cowen says, The doctrine being unsound, McLeod ought not to have the benefit of it either before or on trial, but (the facts being proved) he should be convicted. We humbly conceive that neither ground can be defended. As we view the matter, the doctrine is sound, and McLeod, things having gone on as they have, ought to be put upon trial, and then to have the benefit of it, if the facts permit. The supposed facts being proved, it will be a good defence to a jury, and after conviction (should that take place) it will be a valid ground of further proceedings to stay judgment.

As to the soundness of the doctrine, all the writers agree to what common sense itself dictates, that, civil government being instituted for the common security, one of the obligations of a citizen is to do military service at the command of

his lawful governors. The government has a right to command that service, and to proceed to any length of compulsion or punishment in order to enforce it. This being so, the government is bound to save the citizen harmless for what he does in this way, under its dictation. It is not right that he should be liable to be hung, if he disobeys, by his own government; if he obeys, by the government of a foreign nation. In other ages a different practice has prevailed, and still does among barbarians. But this is the approved doctrine of modern times, and by civilized communities the person of a prisoner of war is now held to be inviolable.

The answer of Judge Cowen and some of the debaters in Congress to this, is two-fold. One part of it consists in adducing cases where the command of a government does not justify the citizen; the other, in an erroneous interpretation of a few passages from the publicists, chiefly one from Vattel. They say, the command of a government to its subject will not justify him to other governments for every thing that he may do. It will not justify him for entering foreign lines as a spy or a recruiting-officer, nor for robbing a mail, nor for poisoning wells, nor for private assassination.

Certainly it will not; the understanding among nations is, that it shall not; and, accordingly, such cases do nothing to illustrate the question in hand, being what the logicians call *impossible suppositions*. A government will not and does not command its subject to become a spy, or a mail-robber, or a private assassin, for the very reason that it knows its command will be no protection, if he obeys. The policy of nations has determined that it is not expedient to allow individual impunity to certain acts, even though they should be done under public direction, and accordingly the public abstains from directing them. The policy of nations, on the contrary, has agreed with the dictate of humanity in according individual impunity to public military operations, carried on under the authority of governments; and accordingly governments, as they see occasion, direct such operations without scruple, and the citizen, with as little scruple as to what his duty is, takes his own prescribed part in them. War, *solemn* and *unsolemn*, may lawfully be carried on by a government for sufficient reason; and, when it is carried on, the soldier engaged in it cannot lawfully be punished for doing any of the acts properly incident to its prosecution. Of

the sufficiency of the reason for waging war in either form, the government waging it is the only judge, and the soldier is not responsible for the correctness of the judgment. A government, when it can make out an extreme case of necessary self-defence, may lawfully send troops into a neutral country. When it determines to do so, the soldier whose agency it commands is bound to presume that it is proceeding rightfully, just as much as in any other case of hostile movement; at any rate, the right or wrong is not for him to determine in this case, more than in any other. And if he obeys orders, and does a soldier's part, (not a spy's, or robber's, or assassin's, — these he is not bound to do, while a soldier's he is,) then he is personally to be held harmless, if taken. And that is the whole plain common-sense philosophy of the matter.

So clear is the general doctrine, that the doing of a soldier's duty is not imputable as a felony, that it would be quite superfluous to collect authorities in its support. Let one or two suffice. Says Rutherforth;

"The members of a civil society are obliged, in general, and those members that have engaged themselves in the military service of it, are obliged in particular, to take up arms and to fight for it at the command of the constitutional governors, in the defence and support of its rights against its enemies from without. . . . . In consequence of the general consent of mankind to consider nations as collective persons, whatsoever is done by the members of a nation at the command of the public, or of the constitutional governors who speak the sense of the public, is the act of the nation, and, if the act is unjust, the guilt in the view of the law of nations is chargeable upon the nation, and not upon the individual members. . . . . When all mankind have agreed to consider the several members of a civil society only as parts of a collective person, that act under the direction of the common will of such collective person, however inexcusable a man who fights against them might be in the view of his own conscience, or of the law of nature, which considers him as an individual, they cannot consistently with this agreement, that is, they cannot consistently with the law of nations, charge him with having been guilty of a personal crime, merely upon account of his having fought against them." — Book II. Chap. ix. § 15. (Vol. II. pp. 545 – 547.)

Again;

"By giving the name of public war to reprisals or other acts

of hostility which fall short of being solemn wars, I suppose the reprisals to be made, or the acts of hostility to be committed, by the authority of a nation, though it has not solemnly declared war. For if the members of the nation make reprisals, or commit acts of hostility, *without being thus authorized*, they are not under the protection of the law of nations. — *Ibid.* p. 548.

Again ;

"In the less solemn kinds of war, what the members do, who act under the particular direction and authority of their nation, is, by the law of nations, no personal crime in them ; they cannot therefore be punished consistently with this law for any act, in which it considers them only as the instruments, and the nation as the agent." — *Ibid.* § 18. (Vol. II. p. 580.)

But, say the opponents, Vattel lays down a different doctrine ; and to show this they refer to the sixth chapter of his second book. The whole passage is as follows ;

"§ 73. As it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not then to say in general, that we have received an injury from a nation, because we have received it from one of its members.

"§ 74. But if a nation, or its chief, approves and ratifies the act of the individual, it then becomes a public concern ; and the injured party is to consider the nation as the real author of the injury, of which that citizen was perhaps only the instrument.

"§ 75. If the offended state has in her power the individual who has done the injury, she may without scruple bring him to justice, and punish him. If he has escaped, and returned to his own country, she ought to apply to his sovereign to have justice done in the case.

"§ 76. And since the latter ought not to suffer his subjects to molest the subjects of other states, or to do them an injury, much less to give open audacious offence to foreign powers, he ought to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment, or, finally, according to the nature and circumstances of the case, to deliver him up to the offended state, to be there brought to justice."

Now it seems to us to be clear beyond the shadow of a

doubt, that Vattel is here asserting, in the strongest and most express terms, the doctrine which we maintain to be the correct one.

In the first of the paragraphs quoted above, he says, that one nation having received an injury from a citizen of another, may not absolutely conclude that other nation to be in fault; and this for the simple reason, that the nation to which the offender belongs may not have commanded or approved, but on the contrary may be ready to disavow and punish, its citizen's injurious act.

But, he says in the second paragraph, should the contrary prove to be the case, should the "nation or its chief approve or ratify the act of the individual, it then becomes a public concern." And the language which Vattel here uses would alone show his opinion to be the opposite of that for which his authority has been appealed to. The act, he says, "becomes a *public concern*," not a public and private concern both. And again; "The injured party is then to consider the nation as the real author of the injury of which the citizen was perhaps only the instrument." There can be no meaning in these words, except to define who is the *real author* of the injury, and accordingly the person who is to be held accountable, in distinction from him who is *only the instrument*, and therefore to be suffered to go free. The second paragraph accordingly disposes of the case where, an individual having done a wrong, his "nation or its chief approves and ratifies." This is the predicament of the assailants of the Caroline, and Vattel's rule is that adopted by our government.

The third paragraph, by every reasonable principle of interpretation, requires to be construed as disposing of the remaining case under the general subject; viz. the case in which "a nation or its chief" *does not* "approve and ratify." Then it is, and then only, that "the offended state" may "bring to justice and punish" the offender, if she has him in her power. That this is the meaning we hold to be altogether unquestionable, because to suppose the contrary is 1. to suppose that Vattel has passed over, without the slightest notice, one feature of the general question, as important as any; 2. it is to suppose that Vattel was capable of writing such nonsense as this; "If a nation or its chief approves and ratifies the act of the individual," and "the offended state

has him in her power," "she may without scruple bring him to justice and punish him. If he has escaped, and returned to his own country, she ought to apply to his sovereign to have justice done." If the case of an act having been approved and ratified (which is that of Captain Drew's enterprise against the Caroline), is the case treated in the third paragraph of the above extract, then it is the case treated in the second period of it as well as in the first; but will any man of common sense pretend, that after a sovereign had approved and ratified an act, Vattel meant to advise an application to him "to have justice done" upon the actors?

This passage, which it seems extraordinary that any reader should misunderstand, and which contains so express a contradiction of the doctrine of Mr. Benton and Mr. Buchanan, was the only one relied on by them in argument in the Senate. It also figures for the same purpose in the opinion of Judge Cowen, who further refers to Blackstone, (Book iv. ch. 5,) and Rutherforth (Book ii. chap. 2. [an error for 9.] § 12.), in which passages, a nation neglecting to punish the offence of a citizen, which it *has not authorized*, is called an *accessory*, an accomplice, and abettor, of his crime; — to another passage of the latter writer (Book ii. chap 9. § 20.) which treats of the privileges of ambassadors, and in which nothing more to the purpose is to be found than that an ambassador "can be proceeded against no otherwise than by a complaint to his own nation, which will make itself a party in his crime, if it refuses either to punish him by its own authority, or to deliver him up to be punished by the offended nation;" — to Rutherforth, again, (Book i. chap. 17. § 6.) and to Burlamaqui, ("Natural Law," Part 2. chap. 11. § 10.) where the subject under discussion is not any relations of states to individuals, but the relations of individuals who become accomplices in each others' acts; — and to Vattel, (Book iv. chap. 4. § 52.) where the case treated is so far from being in point, that in an express reference to the important passage above quoted from the same writer, it is stated to be a different one from the case therein discussed, and to be that of "refractory subjects," "who commit acts of hostility *without being able* to produce a commission from their sovereign."

But, while we are clear respecting the validity of the principle asserted by the British Minister, and acquiesced in by the American Secretary of State, we are equally satisfied of

the correctness of the decision of the New York court, in refusing to discharge McLeod upon *habeas corpus*. Said Judge Cowen;

"That he acted in right of a nation, or under public authority, is no more than matter of justification. It is like the case mentioned in Foster, 265, the public execution of malefactors; and the jury must judge whether the authority may not have been exceeded. But more; where either public or mixed war is alleged in mitigation, either allegation may be fictitious, and it shall be put to the jury, on the proper evidence, whether it existed or not."

We have argued that the principle of personal impunity for doing a soldier's duty, is a sound one. But whether the facts are such as to bring McLeod under its shield, is another question, and one which can only be solved when he shall have been put upon his trial. A legal principle, however good, protects only those who come within its conditions. A prisoner of war, keeping within his prerogatives as such, is secure; but if on his way homewards he steps into a house, and butchers its master, he shall be tried and executed. A public military expedition will protect its agents; but it will not protect any one, who, feigning himself engaged in it, shall have taken advantage of the disorder of the time to gratify a private enmity. Lord Hale appears to intimate, ("Pleas of the Crown," i. 565.) that plunder or robbery by an enemy, in time of war, may be burglary, if not done in the regular prosecution of the war, but "by those that are not in hostility *one to another*." * McLeod claims the benefit of a legal principle, which has reference to a certain class of acts, done under a certain set of circumstances. The principle is a good one, and let him have the benefit of it, if he ought. But who knows whether he ought or not? Who knows what acts he did, and under what circumstances? Who can know, till a jury has made inquisition? For any thing that the New York court had learned to the contrary,

* Burlamaqui, upon this point, after adverting to the difficulty there is in "determining precisely how far it is proper to extend acts of hostility even in the most legitimate wars, in defence of our persons, or for the reparation of damages, or for obtaining caution for the future," goes on to say; "Those who, in a just and solemn war, have pushed slaughter and pillage beyond what the law of nature permits, are not generally looked upon as murderers or robbers, nor punished as such. The custom of nations is to leave this point to the conscience of the persons engaged in war, rather than

when McLeod was brought before them on *habeas corpus*, — for any thing that it knows yet, or can know before the trial, — he was invited home to breakfast by Durfee the morning after the fray, and shot him across the table. The British government claims that he shall immediately have the benefit of a rule of public law, and yet it does not itself pretend to be informed whether the facts are such as properly to bring him under its protection. So far from it, that it is rather of opinion that the facts are not such. "Her Majesty's government," says Mr. Fox, in his letter of March 12th, "have the strongest reasons for being convinced that Mr. McLeod was not in fact engaged in that transaction." That, of the truth of which "her Majesty's government have the strongest reasons for being convinced," may very likely turn out to be true. If it does turn out to be true, then what McLeod did on that night, whether more or less, has nothing to do with the legal principle, so strenuously urged. And at any rate, until it turns out to be false, the American court cannot safely proceed to apply a principle, which it does not know, and even the British government does not suppose, to be applicable. It seems that we are not here reasoning on a mere abstract possibility of McLeod's having done a deed of blood, without the justification put forward for him; for, according to Mr. Choate,

"*It has been said*, in some of the discussions of this subject, although not here, that McLeod left the Caroline after the whole object of the enterprise had been accomplished, and committed an unnecessary, and distinct, and malicious murder on shore. I can say only to this, that no such fact forms any part of the basis of the opinion of the Secretary. He had either never heard of it, or he disbelieved it, or he assumed that the courts of law or the Attorney-General would allow its proper influence to a discriminating circumstance so important." — *Speech*, p. 4.

Now if this has been said, or has been liable, from the circumstances, to be said, the court could not proceed with too much caution. Until it has been ascertained that the putting

involve themselves in troublesome broils, by taking upon them to condemn either party" (Part iv. chap. 5. §14). This is well said; but in the case of mere sudden and transient hostilities, the reason for this connivance at acts of individual malice and wantonness not existing, it seems to follow that they remain to be judged upon their demerits, if the injured party should esteem it worth the while.

to death of Durfee by the hand of McLeod was an act done in furtherance of the objects for which the expedition from the Canada side was set on foot, it is to no purpose to inquire how far the colonial authority could extend protection. No matter what immunity its orders might confer, provided the thing done proves to be altogether different from what it ordered.

We are therefore decidedly of the opinion that the case cannot be properly disposed of without going to a jury. In the uncertainty, necessarily existing at this stage of the business, concerning the nature of the act done, we are not sure that a *nolle prosequi* would be a right and prudent measure. At all events we entertain no doubt respecting the proper action of the Court on the writ of *habeas corpus*. When it has been proved, if it should be, that McLeod put Durfee to death, and that he did it in the execution of a military enterprise set on foot by his lawful superiors, then his counsel will argue that it was justifiable homicide agreeably to the doctrine we have been maintaining, and the jury, being so instructed, as we doubt not they will be, by the court, will pronounce a verdict of acquittal. Should he, on the other hand, which we cannot imagine to be probable, be convicted through erroneous instruction concerning the law, the point will be reserved, and the matter will remain to be set right by the court of ultimate appeal.*

We have argued in defence of the course pursued by the New York court in remanding McLeod for trial, not only because we believe it to be correct, but because it intimately concerns the peaceful relations between the two countries that it should be seen to be so. If he ought not to be tried, then, in refusing his application for a discharge, a great wrong has been done to him, and to England whose subject he is, which country will accordingly be justified in resorting to the most energetic measures of redress. If, on the contrary, as we undoubtingly believe, no wrong has as yet been done, England will have to see that it is so, and to own that

* Under an indictment for murder, the plea of self-defence is as good as the best to procure an acquittal, provided the fact can be made out. But it would not do to discharge a person so indicted, on a writ of *habeas corpus*, in consideration of his affidavit of having been compelled to defend himself, even if the statement were further confirmed by common report and universal belief. So in the case of McLeod. If he killed Durfee in the discharge of a soldier's duty, he ought to go harmless. But the fact that the homicide was committed under that circumstance of justification must be shown, and the burden of proof is on the accused.

as yet she has no cause of complaint. We only regret, — and that we do right seriously,— that the New York court has compromised its own impartiality, by arguing and adjudging that decisive question, which, on its own showing, belongs to a later stage of the proceedings.

We have no great anxiety about the case of McLeod. The worst of it is over, as soon as the parties begin to understand one another. If he killed Durfee in the discharge of a soldier's duty, however unjustifiable the proceeding on the part of his superiors, we have no fear that he will suffer for it. If he killed him under other circumstances, he ought to suffer, and the English government cannot pretend to have cause of dissatisfaction. Our apprehensions are not upon that score, nor can we persuade ourselves that that government feels all the uneasiness which it expresses. Its ingenious diplomacy well knows how to present another issue, in order to keep out of view the true one. The real difficulty will begin when McLeod is at large ; for then there will be no longer an excuse for neglecting to look at the great question of the commanded and avowed outrage upon the American territory. No nation, which means to keep the peace with its neighbours, can do such an act without reasons of urgent necessity, showing the act to be consistent with friendly dispositions on its own part, and with security for the future on the other. No nation which means to hold its own, and to extend protection to its citizens, — none which has not made up its mind to become a by-word and a prey, — can think of sitting down quietly with such an assault unexcused or unatoned for. Before the matter can be disposed of, that strong case is to be made out, which Mr. Webster, in his letter of the 24th of April, has laid before the British minister.

"It will be for her Majesty's government to show upon what state of facts and what rules of national law the destruction of the Caroline is to be defended. It will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive ; since the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the Caroline was impracticable, or would have been unavailing ; it must be

shown that daylight could not be waited for ; that there could be no attempt at discrimination between the innocent and the guilty ; that it would not have been enough to seize and detain the vessel ; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others; and then, drawing her into the current above the cataract, setting her on fire ; and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror."

The best thing to be hoped is, that the English government may be able to make out this case, so as to stand justified in the premises. It would be unprofitable to prejudge an argument, which as yet has not been presented ; but it is impossible to suppose, that silence on the subject can be eventually acquiesced in, or that any thing like the allegation of mere pretences for an act of such high-handed violence can quiet the feeling of anxiety and resentment with which it has agitated this country.

Another of the existing occasions of discontent with England, came under the notice of Congress at the late extra session. On the 14th of July, the President, in compliance with a resolution of the House of Representatives, communicated to that body parts of a correspondence between the American Secretary of State and the Minister at London, "in relation to the seizure of American vessels by British armed cruisers, under the pretence that they were engaged in the slave-trade," and of a "correspondence with Consul Trist [at Havana] upon the subject of the slave-trade."

Our readers are aware, that, in the course of the negotiations prosecuted by England in order to establish a mutual right of search by cruisers of one nation in ships of the other, supposed to be concerned in the slave-trade, the American government has refused to be a party to any such stipulation. It has said ; That trade is piracy by our laws, and we mean, in good faith, to prevent and punish its prosecution by our citizens ; but we cannot permit another power to do it for us. It has maintained the inconvenience of submitting its merchant ships to search by the officers of foreign men-of-war to be so great, that it must decline to come into any such arrangement, or to regard any act of the kind other-

wise than as a violence and indignity to its sovereignty and flag.* As the case now stands, if an English cruiser lies anchored by the side of an American slave-ship while she is receiving her cargo, the former cannot interfere. If an English officer fully believes that a slave-ship bearing the American flag is not in reality American, it is at his peril that he boards her, even to ascertain that fact. If, on examination of her papers, she turns out in fact to be Portuguese or Spanish, he stands justified; but if she proves to be American, no matter what reasons he had to suppose the contrary, his offence is complete. This latter case, it is true, is not likely to arise. The master of an American slave-ship will keep out of an English cruiser's way, because he knows, that, though theoretically secure against arrest, yet, if the cruiser should exceed its authority and send him home, he would be tried for piracy by the laws of his own country. But, if a *bonâ fide* American vessel, not a slave-ship, or able to conceal the fact that she is so, should be examined by an English officer, under the strongest presumption of her being engaged in that traffic under false colors, this is a violation of the friendly relations between the two countries, and one which will not fail to be brought by the injured party to the notice of its government.

It is obvious, that this state of things is fruitful in opportunities for mutual vexation. The English government has put itself to great pains and expense in negotiations for a combined action of the civilized states for the suppression of the slave-trade, to which it has not been able to persuade this country to become a party; and, while it supports a naval force on the African coast to carry into effect its own laws and its treaty rights in relation to this subject, it believes that it is often foiled by the fraudulent protection of the American flag. The British officer on the spot is annoyed by the belief, that, under the lying shadow of the Stars and Stripes, what ought to be his lawful prize is floating under his guns in impudent security. On the other hand, the apprehension, which the Duke of Wellington was candid enough to allow justified our government in not acceding to the right of

* A negotiation for this object came near to being successful in the year 1825, when it was arrested in the Senate, on account of the inequality of the concessions made on the part of England. The proposal has not, we believe, been revived since the letter of Mr. Clay to Mr. Addington, British Foreign Secretary, in April of that year.

search, is realized from time to time. A Salem merchant despatches his ship on an honest voyage, for African ivory, coffee, and gums. A rude and hasty British captain, vexed that he has been so often cheated, makes up his mind too incautiously on the case before him, insults the master, harries the men, vituperates the flag, embarrasses or ruins the voyage, perhaps sends the vessel home. And this is what honest traffickers can ill bear, and a watchful government will not submit to.

Of this description, cases have lately occurred with a very disagreeable frequency. No less than seven are presented in the papers lately sent by the President to the House of Representatives.

On the 13th of November last, Mr. Stevenson, the American Minister at London, addressed a note to the British Secretary for Foreign Affairs, calling his attention to the circumstances of "the seizure and detention of the American brig *Douglas*, of Duxbury, Massachusetts, on the African coast, by Lieutenant Seagram, of her Majesty's brigantine, the *Termagant*, on the charge of having on board a suspicious cargo, and intended for slave-trade." Another note, of the 27th of February, detailed the circumstances of two other like outrages, as follows;

"The first case is that of an American schooner, the *Iago*, of New Orleans, commanded by Captain Adolphe Dupouy.

"This vessel sailed from Matanzas, in the island of Cuba, in November, 1838, for the Cape of Mesurado, on the coast of Africa, for the purpose of trading in palm-oil, wood, and other African produce.

"That, after proceeding on her voyage to different parts of the coast, she arrived at Cape St. Paul, where the captain landed his cargo, and from whence he was preparing to go into the interior of the country to trade, having bought for that purpose a quantity of oil and produce.

"That, on the 21st of February, 1839, and whilst within 5° 46′ north latitude, and 00.55′ east longitude, and whilst Captain Dupouy was on shore, the schooner was boarded by Lieutenant S. S. Seagram, commanding Her Majesty's brigantine of war, the *Termagant*, and during his absence his trunk was broken open, and a sum of money, amounting to one hundred and sixteen Spanish doubloons and fifty-four dollars, was taken therefrom, as also his chronometer and watch,

and that a large quantity of wine was drank, destroyed, and lost; that all his men had been conveyed on board the *Termagant*, except the mate; that the captain thereupon asked leave of Lieutenant Seagram to search the sailors, and, in doing so, found upon them a sum amounting to one hundred and fourteen doubloons, and nineteen dollars, and that the sailors informed him, that they had taken the money because they were afraid that they would be set on shore and abandoned, and the schooner destroyed. That all the captain's clothes were left on shore, and have been wholly lost.

"That all the crew, and a passenger by the name of Bouyolli, an American citizen and native of the State of Maryland, were put on shore at Cape St. Paul, and that Captain Dupouy was detained and brought to Sierra Leone, where he arrived on the 18th March, 1839.

"That Lieutenant Seagram then endeavoured to proceed against the Captain of the *Iago*, in the British and Spanish mixed court of justice, established in the colony for the prevention of illicit traffic in slaves, but the court would not allow such proceeding; and that, accordingly, on the 30th March, 1839, Captain Dupouy was put in possession of his vessel, which was done in the presence of four masters of vessels, who signed a receipt for the vessel, and who were present when an inventory was taken of the articles on board the said schooner.

"Amongst the documents herewith transmitted are two certificates of Lieutenant Seagram, the one admitting the capture of the vessel, and the other stating the amount of money found in the possession of the crew, and left in charge of the prize master.

"The other case is that of the schooner *Hero*, of New Orleans, commanded by Captain James B. McConnell.

"It appears, that this schooner sailed from the Havana in June, 1840, with a cargo of assorted merchandise, bound to Wydah, on the African coast. That on her voyage, on the 9th of August, she was boarded by Her Majesty's brig the *Lynx*, and brought to anchor; her hatches were broken open and overhauled, and the commander of the *Lynx* then determined to send the schooner into Sierra Leone. That, after removing a part of the crew of the schooner on board the cruiser, and sending his own men to take charge of the *Hero*, who robbed her of a part of her supplies, the commander of the *Lynx* determined to surrender the schooner, and permit her to pursue her voyage. That, on the arrival of the schooner at Wydah, her cargo was found to have been greatly damaged by the crew of the *Lynx*, during her capture and detention by the British commander."— *Cong. Doc. pp.* 4, 5.

Mr. Stevenson hereupon repeats the assertion of the principle, always assumed by his government, and also, as he shows by an extract from a letter of Lord Palmerston, maintained by the British government itself, in its correspondence with that of Hayti;

"Of the right of one nation to search or detain the ships of any other (who may not be a party to the treaties for the suppression of the slave-trade) on the ground of their being engaged in slave-trade, there is no shadow of pretence for excusing, much less justifying, the exercise of any such right. That it is wholly immaterial, whether the vessels be equipped for, or actually engaged in, slave traffic or not, and consequently the right to search or detain even slave vessels, must be confined to the ships or vessels of those nations with whom it may have treaties on the subject." — *Cong. Doc. pp.* 5, 6.

On the 2d of March last, Mr. Forsyth forwarded to Mr. Stevenson papers relating to four more such cases, and instructed him "to address without delay to the British government a demand for proper redress," with the warning that "persistence in these unwarrantable proceedings is not only destructive of private interests, but must inevitably destroy the harmony of the two countries."

On the 16th of April, Mr. Stevenson complied with this instruction, arguing the question again at some length, and expressing "the painful surprise with which the government of the United States have learned, that the repeated representations which have heretofore been made on the subject, have not only remained without effect in obtaining a favorable decision, but have failed to receive the attention which their importance merited;" and avowing, again, "the fixed determination of the American government, that their flag is to be a safeguard and protection to the persons and property of its citizens, and all under it, and that these continued aggressions upon the vessels and commerce of the United States cannot longer be permitted." Mr. Stevenson adds, that "her Majesty's government have permitted a delay to take place of so marked a character as not only to add greatly to the individual injuries which have been sustained, but to become itself a fit subject of complaint," and that "neither the dignity of the government of the United States, nor the duty which it owes its citizens, can justify any further delay." On the 14th of May, he informed Mr. Webster, that he had received Lord Palmerston's promise of

"an early attention to the subject"; but, writing again on the 18th of June, he has still nothing better to say, than "in relation to the cases of African seizures, I have been unable to get any answer, although, as you will perceive, I have pressed the subject with every degree of urgency." And here, as far as the public knows, the negotiation stands at the present day.

One thing is certain about this matter, that if England means forcibly to insist upon and exercise a right of search, which she has never been able to extract from us by negotiation, and allows herself to treat us in a manner, in which, holding our own argument, she refuses to allow Hayti to treat her, she has first made up her mind to push us to the issue of war. Whether this be so, will be better known when an answer comes to Mr. Stevenson's remonstrances. Meanwhile, there is another thing, besides remonstrating, which our government has to do, in order to stand upright in this controversy. It is the part of wise rulers, as well as of other wise people, to take men as they find them, and, accordingly, to avoid offering the provocations of even unreasonable offence. It belongs to sensible and just nations, as well as individuals, not only to defend themselves against injury, but to remove, when they honestly may, its occasions. The manifestation of a heartier purpose on the part of our government to execute its own laws for the suppression of the slave-trade, would go far towards removing both the occasion of the outrages complained of, and that distrust of its sincerity, which accounts for, while it does not excuse, them. There would be no pretence for a British man-of-war to examine the papers of a supposed slave-ship under the American flag, when there was an American cruiser at hand to do it. But did any one ever hear of the capture of such a ship by an American cruiser? We never did, and should be much obliged to any one who would acquaint us with a case. Two or three light vessels would at the same time clear the coast of the horrible scandal of the American flag being engaged in that business, and exclude the occasion of indignity being offered to that flag by any foreign power. Again; no suspicion of transactions like those reported to have taken place at Havana, — of which the nation is impatient to know more than it has yet been told, — should be suffered to gain, or at least to maintain, any currency. We take no ground respect-

ing the criminality of Mr. Consul Trist. We are willing to suppose him to be the purest sufferer that ever the wanton tongue of rumor wagged against. But certain it is, that the British honestly believe that, with his privity and aid, the slave-ships from Cuba have gone furnished with a double set of papers to be used as occasion might require, one set being American, to which they were no more entitled than to Chinese. Nothing but the strongest proof, it is true, should be suffered to convict him as a partner in any such atrocity. But, on the other hand, nothing but the strongest proof of innocence should have been held sufficient to retain him in a place, in which his presumed mal-administration was bringing so much mischief, and, worse, so much dishonor, on the country.

Besides the imminent causes of difference which we have mentioned, two others of a grave character exist. We might, perhaps, be expected to say, three. But the third, we suppose, can hardly assume hereafter any great practical importance. The British refuse to give up American slaves, who, by stress of weather or other accident, are carried into their ports. It is idle to imagine that England will ever be brought so much as to entertain a question upon that point. Her determination, that whoever sets foot upon her soil shall be free, is, without doubt, irrevocable, and beyond the power of any possible coercion to shake it. Massachusetts and Ohio, — and probably the other free states of the Union, in which the question has not yet come to trial, — refuse to surrender slaves, except in the case of *fugitives*, in which they are bound by a provision of the Federal Constitution. What members of the American confederacy will not do in this matter, it is hardly to be dreamed of that England will, or that the American government will see its way clear to insist that she shall do.

The two other questions to which we refer, we scarcely need say, relate to the recent British encroachments on American territory along its Northeastern and Northwestern boundary. Our readers will remember that we have at different times treated both these questions at large, bringing our accounts of their position down to the present time. As to the first,* from the period when England, disappointed in its

* For discussions of the Northeastern Boundary question, see *North American Review*, Vol. XXVI. 421; XXXIII. 262; XXXIV. 514; XLIII. 413; LII. 424 *et seq.*

endeavour at Ghent, to obtain a cession of part of the district of Maine in order to connect Quebec and Halifax, was tempted to set up a claim of right to it as falling to her within the provisions of the treaty of 1783,—from that period down to the time when Mr. Forsyth recently took a stand upon the subject, things have been constantly going on from worse to worse for us, thanks to the bad management of Mr. Livingston, and the cool pertinacity, on the other hand, of the English government, deluding many who have not attended to the facts, into the idea that England must have something of a case. All now is as unsettled, and apparently by no means so easy to be settled, as when President Jackson came into office. With as clear a right as ever nation had, we have meanwhile embarrassed ourselves with causeless concessions and fruitless attempts at compromise. England has more and more boldly assumed ground, which to assume costs all the difficulty, and put on an arrogant bearing, which it may be hard for her now to put off, so as to recede to the ground of reason and fair-dealing. Disorders have broken out along the line, which have only been pacified from time to time by great prudence and good fortune. It is as clear as day, that the present state of things is altogether too insecure, and fruitful of mutual provocation, to last long. The borderers of Maine and New Brunswick can scarcely keep their hands off one another, so as even to give the hitherto baffled diplomacy of the two nations any further chance. Nobody can conjecture how the thing is to be settled. Nobody can doubt that some amicable adjustment must be made speedily, or else the hope of it be abandoned.

The question of the Northwestern boundary attracts less attention, only because the practical inconveniences growing out of it have hitherto been less, and because it has taken a less prominent place in the negotiations. But it is one which cannot be left out of sight; nor, while England, day by day, pushes her trade further within our limits, multiplies and strengthens her trading posts, and extends her relations with the Indians, can its settlement with any prudence be delayed. Our readers need not to be reminded, that the claim of the United States to the territory of Oregon is threefold;* be-

* For discussions of this subject, see the *North American Review*, Vol. XLVIII. 109. Vol. L. 75 *et seq.*

ing founded, 1. On the discovery and exploration of the Columbia River, in 1792, by the Boston ship *Columbia*, Captain Gray, — an event which, by the Law of Nations, invested this nation with the claim of priority over other civilized states, to the country watered by that river and its tributaries, that is, to the 51st degree of north latitude; 2. On the exploration of that country by the over-land party of Lewis and Clark, in 1805 – 6; 3. On the purchase of Louisiana, viz. to the 49th degree, and the Florida treaty of 1819, by which we became successors to all the territorial rights of Spain, viz. from the 42d degree of north latitude, the northern boundary of Mexico, to the 60th degree, the southern boundary of the Arctic possessions of Russia.* From this extreme northern limit, however, the American government, for the sake of a peaceable settlement of the question, have been willing to recede, and have repeatedly offered to that of Great Britain, to keep to the Louisiana boundary line, (which, east of the Rocky Mountains, runs along the 49th parallel of North latitude,) and continue it westerly to the Pacific Ocean; an arrangement which would give Nootka to England, to which post it pretends a right, having obtained a cession of it from Spain in the Convention of 1790, in a manner, however, which we will not now stop to argue upon, but which this country maintains cannot justly be construed in prejudice of its title.

At the peace of Ghent in 1814, among various matters left for subsequent adjustment, one was the settlement of this boundary in the northwest. By the convention of 1818, it was agreed, that, without "prejudice of any claim of either of the two high contracting parties," the country in dispute, west of the Rocky Mountains, should be "free and open, for the term of ten years, to the vessels, citizens, and subjects of the two powers." Negotiations were resumed in 1826 and 1827, but came to no result; and, by the convention of September 6th, of the latter year, the same provisional arrangement was renewed, to be "further indefinitely extended and continued in force" till either of the contracting parties should give "due notice, of twelve months, to the other contracting

* To these may be added, as a fourth ground of right, that of prior settlement, the American establishments at the mouth of the Columbia having preceded any British establishments on the coast, or in the interior, south of latitude 50°.

party, to annul and abrogate" the same. This convention is still in force, though a Senator from Missouri, at the late session, presented a resolution, requesting the President to give the requisite notice, and proceed, at the expiration of the year, to occupy the country. This measure, whenever it is adopted, must bring the question to some crisis, and it cannot be matter of surprise that the western people, reasonably apprehensive of foreign influence over the Indian tribes, their neighbours, should be impatient for its consummation. England, through the operations of her Hudson's Bay company, is vigorously profiting by the time of delay, to strengthen her position in the country, and give a better ultimate color to her pretension of ownership. She holds, at this moment, a fort of considerable strength, a hundred miles up the Columbia (Fort Vancouver), and another (Fort George, formerly *Astoria*) at its very mouth. When she has already drawn a maritime line around us on two sides, from Yucatan, through the Windward Islands, to Halifax, and a line of posts and Indian allies along a third from Quebec to Nootka Sound, it is uncomfortable to think that she is quietly creeping upon our back along the western ridge of the Rocky Mountains. The coils tighten too fast for easy breathing.

In these cursory remarks, we have confined ourselves to the questions, which imminently threaten the peaceful relations of the two countries. England owes it to her sense of justice, and to the comity, if we may not call it, the Law, of Nations, to allow us a free navigation of the St. Lawrence, to and from our ports along that river and the lakes; and whenever she shall be belligerent again, her extreme doctrines of blockade and impressment will need to be materially modified, or they may, as they did before, put it out of our power to be neutral. But these are matters, which, however they demand adjustment, do not so instantly press.

What is to come of it all? Who can tell? But it does seem as if matters could hardly stand as they are, and that something must come soon. It will be strange, undoubtedly, if, in this reasonable nineteenth century, two such nations as Great Britain and the United States shall not be able to see the right as to the questions between them, and be willing to render mutual justice, instead of going to work to harm themselves, while they distress each other, and break

the peace of the world. Apart from the paramount considerations enforced by religion, civilization, and humanity, peace is the true policy of both. For ourselves, all that the heart of man can reasonably covet is within our possession or within our reach, to be enjoyed without the slightest necessity of giving annoyance to any other people. We want nothing but to be let alone. Time will take care of the rest; and, in the developement of our resources, our own growth and prosperity, so far from involving any damage elsewhere, will be proportionate to the large contributions we are in a condition to make to the wealth and welfare of friendly nations. The only object which we can be tempted to go to war for, is security. England, on her part, has the wounds of past ages of blood to heal, and their frightful wastes to repair; and she has a large discontented population to care for, which can ill live with heavier taxes to pay, and less employment to earn with. It would be a pity for her to leave off paying her vast debt, and begin again to increase it; and we, above most other nations, are good customers in her markets, and make it worth her while to live with us on good terms.

Still, the feeling of might is very apt to lead to a forgetfulness of right; and the love of fighting, and the lust of conquest, have scarcely been manifested by any other nation in all time to the same degree as by England since the accession of the present reigning house. England, without doubt, has a great deal of might to feel. If she means to drive us to a war, it would be folly to take up her challenge under any impressions to the contrary. She has great resources in numbers, valor, conduct, and wealth. If we have to go into this conflict, it will be with a nation, which, after coming triumphantly out of a twenty-five years' battle, in part of which she had defied, single-handed, the civilized world, has now been refreshed by twenty-five years of peace, interrupted only now and then, sufficiently to keep her military faculties in practice. Undoubtedly she can bear upon us hard enough to call for the exercise of all our virtue.

Still, if she will have it so, that virtue must be summoned. It is not safe, any more than it is right, that we should acquiesce in encroachments and affronts from any quarter, however formidable. It is not safe, because to yield to them is at once to invite their repetition, and to abandon our vantage-ground, by impairing the strength and spirit which will be

ultimately needful to repel them. We must insist, at all hazards, on having our boundaries recognised and respected; and we must refuse to be subject to have our villages entered at night by a party of desperate men, engaged to follow any future Captain Drew "to the devil." Security is only to be found in a cool vigilance and determination; and in them it is to be found; we are not a people needing, or likely, to distrust their efficacy in any troublesome posture of affairs.

And, if this contest would be a serious thing for America, it is not to be supposed that it would prove mere play to her antagonist. "England," said her great captain of late, "will not make a little war." It is to be presumed he said it not more with pride, than with a sober and solicitous sense of the responsibleness incident to the possession of such power. "It is glorious to have a giant's strength, but it is pitiful to use it like a giant." At any rate, if England will not make a little war, no more, at this day, will America. As a nation, Heaven knows we have plenty of faults; but in the bull-dog virtues of the Anglo-Saxon breed, it is not said that we are anywise deficient. We managed to hold up our heads through the last war, with a population which has doubled, and an amount of wealth which has probably trebled, since that time. On the ocean, we even then knew how to conquer, from the first; and, after two years' hard buffeting, we learned how to do it upon the land; and what has been, may be again, and more. With an ordinary taxation of some twenty-five millions of dollars, we can better bear an increase of burdens upon our smaller means, than England with hers, of eight or ten times that sum. Though, when left to ourselves, we are careful to grow rich, or at least, what we call *well to do*, there is no people on earth, who can so well bear to be poor; it must go hard with us, indeed, when, from any unlucky chances of war, we shall not find enough to eat, drink, and wear. Our old Plymouth colony (and the blood is not exhausted) once carried on a war till it sunk every dollar of the personal property of its inhabitants, and then it conquered, and they recovered themselves, and went on presently as if nothing had happened. Our people, if they are forced into this contest, will go into it under an intense and unanimous sense of wrong, which will call forth all their energies and resources for its prosecution. They will undoubtedly go into it with a determination that this disturb-

ing question of boundary, if it cannot be settled in one way, shall be put at rest in another, effectually and for ever; that the "continuous strain of the martial airs of England, circling the earth," shall be abridged of that great arc that crosses North America, and her "morning drum" cease to be beat henceforward within a northwestern Indian's hearing. We do not say that that purpose will be executed; — such issues are in the womb of time; — we but say that it will be the purpose, and that it will be one hard to subdue. And let not England, above all, flatter herself that such scenes as some of those rehearsed, in the last war, along the Chesapeake and the frontier, are to be acted over again at as little cost. There is a way to her islands as well as from them, and it is not given to her for ever, while she does such things herself,

> "to sit at ease,
> An island queen, amid her subject seas,
> While the vext billows, in their distant roar,
> But soothe her slumbers, and but kiss her shore."

If the question be of sacking and burning towns, — it is a horrible one, but if she insists on again presenting it, — Baltimore, with its considerable wealth and insufficient defences, is not nearer to the salt water than Brighton, with its perhaps equal wealth, and no defences at all; and Liverpool, taking the chances of the weather, is only two-thirds as far from New York, as New York is from Liverpool. They are apt to remind us, that we have three thousand miles of unprotected seacoast; and how far, we would ask, from two-thirds of this extent of seacoast, have the two British islands; and how vast is the disproportion, on the other hand, of assailable and valuable substance scattered along that beach; and what are the coast fortifications of England good for, anywhere except at her naval depots? For the most part, her old works elsewhere, where they have been kept up, are out of date, and of small worth in the present state of the science of war, her reliance having been placed on her wooden walls; — substantially a good defence, no doubt, but not a sufficient one against a sudden descent. Ships have to pay respect to wind and weather, and cannot be at every moment at every place that may need their succour; and, with the favor of circumstances and a sufficient motive, Yankee contrivance has done more improbable things

before now, than would be "marching three miles on English land," and doing in a night what would be remembered through a century. We are not speaking of any permanent lodgment upon the soil; — that of course is out of the question, though no more on the one side, than on the other; — but of sudden raids, which, between running into a harbour and being out of it again beyond pursuit, would take no more time than did Paul Jones's visit to Selkirk Castle, or the conflagration of Havre de Grace or of Buffalo. And the improbability of such adventures being undertaken and being successful, is lessened with every improvement in the use of steam power in naval operations.

But why so much as allude to such undesirable possibilities? Why, except to show that it would be unreasonable for the great power of England to harden itself in wrong through an excessive confidence in its security? We hope, and we believe, that two nations by whose continued good fellowship humanity has profited so much, and may look for so much more, will find some other way of composing their unhappy differences besides that, which, while it has been so falsely called the "last resort of kings," ought to be the last, — the grievously reluctant, even where it seems to be the indispensable resort, — of free and righteous men. Certainly we think that England has gone far in committing herself to a course of insufferable injustice. But she has taken no irrevocable step, — none which cannot be retraced without dishonor. We hope much from her returning sense of justice. We hope much from that respect, which becomes her, great as she is, for the judgment of the world, and of history, which will not excuse her for pertinacity in oppressive pretensions. We hope something from the influence of her numerous good and wise men in private life, who will be tender of her fair fame, and distressed to see her great power put forth in sanguinary attempts to execute a wrong. We hope something from her sober regard to her own well-being. England is above being threatened; but she is also above being provoked to the commission of crime by a decent warning of its consequences. In her sober mind she knows, — however imperfectly her practice may correspond to the conviction, — that the end of a feast is much better than the beginning of a fray, fair as the prospects of the latter may be; and, when she thinks of her power to annoy us, she ought to know that we

are too true children of her own loins to be excited by adversity to any other feeling except a determination to resist and overcome.

The recent change of ministry we are inclined to regard as an event of happy augury for us. The Conservatives come into office so strong, that they can better afford to give to all their due. Not obliged to bespeak the most sweet voice of this declaiming radical on the one side, nor to *cotton* to that church-and-king borough-owner on the other, they are in a condition to look for the upright, in distinction, if need be, from the profitable and popular. We will not despair of their finding themselves able to say to the people of England; "You would not yourselves be pleased to have Louis Philippe come, looking for Louis Napoleon, into Dover harbour, lay about him with sword and musket upon its pier, shoot an Englishman, and cut out an English ship to be burned; then, like frank, honest people, as we are, and not afraid to own ourselves in the wrong, let us tell these Americans that we are sorry, that, in a flurry, we burned the *Caroline* and killed Amos Durfee. It is provoking, no doubt, to see our good intentions baffled by a machinery of fraud, converting a Spanish vessel, which we have a right to search and send home, into an American, which we must not touch; yet you would not yourselves easily consent to have your own fair traders molested, your own red-cross insulted, by hot-headed foreign subalterns on the high seas; and it is but doing as we would be done by, to charge our own cruisers to respect other sailors' rights. You would not yourselves like to hear, that a great piece of Canada was first roved over by herds of lawless Yankee trappers, and then claimed at the point of Yankee bayonets; let them have then their worthless tract along the Oregon, which they think so much of, and much good may it do them. The negotiations, it is true, have a little obscured a simple matter, yet, after all, it must be owned that water will not run up hill, and that whatever those lands are, which pour down rivers in different directions from their opposite sides, the same are 'highlands' in the common sense of men and in the contemplation of treaties; let us give up the point magnanimously, and wish the snuffling barbarians joy of each other's company about those precious frozen springs of the St. John's. We shall then have put ourselves in the right, and, having satisfied our own consciences, we shall not

care who else is satisfied. If they annoy us after that, we are Englishmen, and shall know how to teach them manners."

We verily believe that the people of England, when the right of these matters is explained to them, will wish to see it done, and that any thing but permanent unpopularity will be incurred by a ministry, which shall address itself to its explanation and execution. Sure we are, that to recede from once-meditated iniquity is far less shameful than to persist in it, and that the politicians, who, by that honesty, which is always the best policy, shall have healed the feuds between two nations that owe so much to one another, will have entitled themselves to the cordial and lasting gratitude of the human race.

ART. VI. — *Biographical Memorials of* JAMES OGLETHORPE, *Founder of the Colony of Georgia, in North America;* by THADDEUS MASON HARRIS, D. D. Boston. 1841. 8vo. pp. 424.

GEORGIA was the last of the Old Thirteen Colonies, which were founded under the auspices of the British government in North America. The origin and early progress of this colony are mainly to be ascribed to the philanthropy, enterprise, and generous efforts of Oglethorpe. Hitherto the incidents of his long life have been found only in detached portions of the history of his time, in the almost forgotten tracts relating to the first settlement of Georgia, and in the biographical accounts of some of the eminent men with whom he associated. Dr. Harris, with a lively interest in his subject, and much patience of research, has gathered up these fragments, and in the volume before us has presented them in the form of a connected narrative. Considering the nature of his materials, the author's task was neither inviting nor easy; but it has been well executed, and he has rendered a just tribute to the memory of a distinguished benefactor of mankind, and a valuable service to the history of his country.

James Oglethorpe was the son of Sir Theophilus Oglethorpe, of Godalming, in the county of Surrey. There has been much uncertainty respecting the precise date of his birth. After a full investigation of this point, Dr. Harris